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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 430

JOSEPH O. JANOUSEK,
Petitioner

v.

EFFIE D. CHATTERTON,
ELIZABETH S. CHATTERTON,
ELEANORE C. FORSYTHE,
REALTY TITLE INSURANCE CO., INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI

JOSEPH O. JANOUSEK
Pro Se
American Security Building
Washington 5, D. C.

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

The petitioner herein, Joseph O. Janousek, (plaintiff in the United States District Court for the District of Columbia, appellee and appellant, respectively, in the two related appeals consolidated in the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit) respectfully prays that a writ of certiorari issue to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit entered in these causes on June 23, 1960.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 31) will be officially reported in Volume 279 or 280 Federal Reporter 2nd Series. It is printed in Appendix A hereto, *infra*, p. 1A. The orders of the District Court (R. 17, 28) were entered without written opinion, and are printed in Appendix B hereto, *infra*, p. 5A. The earlier opinion of the said Circuit Court of Appeals, referred to in its present opinion, (R. 32) is reported in 261 F.2d 766, and is printed as Appendix C hereto, *infra*, p. 6A. The earlier District Court order, referred to by the Circuit Court in its present opinion, (R. 32) is printed in Appendix D hereto, *infra*, p. 24A.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 23, 1960, (R. 35), *infra*, p. 4A. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The Circuit Court heretofore affirmed orders of the District Court (1) denying any adversary contest in court (beyond oral argument of counsel) on strenuously contested issues wherein alleged payment of the petitioner's judgment in the District Court was claimed by respondents and denied by petitioner; and, (2) ordering satisfaction of the petitioner's judgment without trial of the issues or any real adversary hearing of the issues before the Court (beyond oral argument of counsel), the Court declining to permit appearance of witnesses, to permit examination and cross-examination of witnesses the petitioner sought to have appear and proposed to bring before the Court, (*infra*, 22A, 20A), or to permit the petitioner to defend his judgment in court by any trial or hearing of testimony on the issues.

In its present opinion, (*infra*, 1A), the Circuit Court affirms a subsequent order of the District Court dismissing the petitioner's independent action in equity (brought under the provisions of Rule 60(b) F.R.C.P.) to set aside the above order of satisfaction of petitioner's judgment. In its affirmance the Circuit Court bases its decision on the view that the independent action shows "intrinsic" fraud. The Court refers to the summary motions proceeding, and its opinion of affirmance whereby petitioner was given no opportunity to defend his judgment, and was given no opportunity to develop or establish the fraud in any form of trial contest before entry of the order of satisfaction; the independent action pleading, moreover, facts of fraud (1) which petitioner had no opportunity to put in issue in the summary motions proceeding, (2) which prevented the petitioner from having a full hearing on the issues in the former summary motions proceeding and, (3) which prevented the petitioner from defending his judgment.

In its present opinion the Circuit Court reversed the District Court's order dismissing respondents' counterclaim filed in the independent action. It purported to allege malicious prosecution and abuse of process based upon the independent action. The counterclaim was filed before termination of the independent action, while the amended complaint in the independent action was pending, contrary to fundamental requirements that no action for malicious prosecution exists before the action on which it is based is finally terminated. The opinion of the Circuit Court reinstates the counterclaim not for abuse of process but for malicious prosecution.

Upon this summarization, the questions presented to this Court for allowance of a writ of certiorari are these:

1. Whether Rule 60(b)(3) of the Federal Rules of Civil Procedure may be judicially administered in the lower Federal Courts to deprive a party of his judgment

without opportunity to be heard in a proper contest, without full hearing on controverted issues of payment:

a) by the District Court's refusal to hear witnesses and testimony proffered, and refusal to grant any trial of the issues before entry of an order of satisfaction on the judgment debtors' motion, without any adversary contest or hearing beyond argument of counsel:

b) by the District Court's subsequent dismissal of an independent action filed by the judgment creditor to set aside the order of satisfaction so procured, showing fraud and concealment from the court which prevented presentation of the case in a proper hearing, and showing that the fraud had prevented an adversary contest and trial of the issues in the District Court.

2. Whether in an independent action brought under Rule 60(b) to set aside the order of satisfaction of a judgment entered without full hearing or any trial of the issues, the fraud pleaded is "intrinsic" where the allegations show there has been no previous trial of the issues, no opportunity to present witnesses or to examine and cross-examine, or any actual hearing of the issues in court, beyond argument of counsel, in which to show the fraud pleaded.

3. Whether a counterclaim for alleged malicious prosecution filed in the independent action and based thereon can be sustained while the action on which it is based is still pending.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 60. Relief From Judgment Or Order. (b)(5) . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged . . . This rule does not limit the power of a

court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court . . . the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT

The petitioner, as attorney for respondents, prosecuted their claims against Edward W. Chatterton to a judgment of $18,846 in the United States District Court in Texas. The respondents later effected settlement and dismissal of the judgment surreptitiously with Edward W. Chatterton in breach of their contract with the petitioner, and declined payment of professional compensation and reimbursement for costs advanced by petitioner. Petitioner filed suit in the United States District Court for the District of Columbia (7A, R. 22) where he recovered a judgment against respondents for professional compensation and his advancements (10A, R. 22). The jurisdiction of the District Court below was founded on Title 3, Chap. 11, District of Columbia Code, 1940, and continues under the provisions of Rule 60(b) F.R.C.P. Later the respondents filed a motion under Rule 60(b)(5) in the District Court below, alleging partial satisfaction of petitioner's judgment (11A, R. 22). Petitioner moved for a hearing on the issues and exercised all possible diligence in trying to obtain it. He set forth facts strongly indicating fraud he could not develop without a hearing in the presence of the Court (17A-22A, R. 23). It was opposed strenuously then by the respondents and continuously since (R. 24) notwithstanding it was estimated (in response to the District Judge's inquiry) that the hearing would require only "the better part of a day." (22A). Petitioner's request for a full hearing was denied; partial satisfaction as sought by respondents was ordered (23A, R. 24). The affirmance of these orders is referred

to in the present opinion of the Circuit Court (R. 32), and appears at page 6A, *infra*. Petitioner continued his investigation and later filed the independent action to set aside the order of partial satisfaction, pleading facts showing fraud on the court and fraud which had prevented a proper adversary contest and hearing on the issues which had been decided in a summary motions proceeding. The jurisdiction of the District Court is founded on Title 11-306 of the District of Columbia Code, 1951, and the provisions of Rule 60(b), F.R.C.P. The action was dismissed with leave to amend. The complaint as finally amended (R. 21) was dismissed (R. 28, 5A), and this was affirmed by the Circuit Court in appeal No. 15470 of that Court (R. 32, 1A).

While petitioner's independent action was pending in the District Court, respondents first filed a counterclaim for "abuses of civil process and/or malicious prosecution" (R. 3). It was dismissed on petitioner's motion with leave to amend. Exercising sheer invention and composing allegations concerning the case, the petitioner and statements they attributed to him, all wholly wanting in verity, the respondents abandoned their charge of malicious prosecution and concentrated on an alleged abuse of process in their amended counterclaim entitled "Amended Counterclaim for Abuse of Process", (R. 13). This was dismissed upon petitioner's motion in the District Court (5A, R. 17). Notwithstanding the amended counterclaim was filed prior to final termination of the petitioner's independent action, and any theory of malicious prosecution must necessarily have been based on this action, the Circuit Court below, in appeal No. 15,315, reversed the District Court's order of dismissal, holding that the amended counterclaim substantially met the requirements of a suit for malicious prosecution (2A, 3A; R. R. 33, 34).

REASONS FOR GRANTING THE WRIT

I

In No. 15470 of its consolidated decision (1A, R. 32), the Circuit Court below refers to and predicates its decision in part on an antecedent appeal of this matter (No. 14448) in which the Circuit Court affirmed the District Court's order denying the request of the petitioner herein for a full hearing on the issues in a Rule 60(b)(5) proceeding, and ordering satisfaction of petitioner's judgment without hearing of proffered witnesses or allowing the adversary contest on controverted issues that is required and that is customarily afforded in other Federal Circuits. The action of the Circuit Court below is a denial of the fundamental right of a hearing, is a matter of erroneous judicial administration of Rule 60(b) of the Federal Rules, and is counter to and in conflict with these decisions:

It is in conflict with the decision of this Court in *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, where this Court declared that a judgment "cannot be nullified without adequate opportunity to be heard in a proper contest . . .", and that ". . . obviously a court cannot deprive a successful party of his judgment without a proper hearing." In the *Universal Oil Co.* case this Court stressed the necessity of observing the safeguards of adversary proceedings and reviewed the case because of the importance of questions of judicial administration involved. It is respectfully submitted that the instant case similarly involves important questions of judicial administration. The decisions of the lower Courts in this case affect not only the petitioner but every person comprised in that wide class of persons who have judgments or rights in judgments or orders reviewable in Rule 60(b) proceedings, and who, by the decisions of the lower Courts in this case, stand in jeopardy of being deprived of those rights and judgments not by the safeguards of a proper

hearing but by a summary motions proceeding extending no right of hearing other than argument by counsel. The decisions of the lower Courts also stand in conflict with the standards and procedure indicated by this Court in *Klapprott* v. *United States*, 336 U.S. 942.

It is in conflict with decisions in other Circuits. In the Thrd Circuit, in considering an application for extraordinary relief made under Rule 60(b)(6), the Court of Appeals pointed out in *F.D.I.C.* v. *Alker*, 234 F.2d 113, that the District Court was required to resolve the issues raised by the motion and answer "by receiving evidence and making full findings with respect to the facts alleged in the defendants' motion, including the nature of the testimony the proffered witnesses will give at a new trial if granted . . . Obviously such a determination could only be made after a full hearing in the district court at which the defendants have an opportunity to produce their witnesses and the use-plaintiffs their rebutting witnesses." In *Oliver* v. *City of Shattuck*, (10th Cir., 1946) 157 F.2d 150, a 60(b) proceeding for relief from a judgment, the court points out that factual conflicts are to be resolved by a full hearing in the district court as was the procedure in cases of *coram nobis* and *audita querela*, and that the judicial process was not rendered less flexible by Rule 60 of the Federal Rules. The present case is also in conflict with *Ferrell* v. *Trailmobile, Inc.* (5th Cir., 1955) 223 F.2d 697, a proceeding for relief from a judgment under Rule 60(b). The district court declined to receive any testimony offered and denied the motion. The Circuit Court in reversing the order declared that "the appellant was entitled to a full hearing on the merits of its motions."

II

By denial of the hearing he requested in the earlier motions proceeding, the petitioner was given no opportunity to put in issue the fraud pleaded in his independent

action. Indeed the fraud pleaded shows that it was instrumental in preventing any full hearing and a full adversary proceeding, that the petitioner was prevented by the fraudulent conduct, coupled with the strenuous opposition of the respondents to petitioner's requests for hearing, from fairly and fully presenting his defenses to the respondents' alleged claim of satisfaction. The decision of the Circuit Court below, affirming dismissal of the petitioner's action by the District Court, and defining the fraud pleaded as "intrinsic", is in conflict with the decisions of this Court, particularly *United States* v. *Throckmorton*, 98 U.S. 61.

The Circuit Court in its opinion in this case refers to an "oral hearing"—a hearing at which no witnesses were permitted to appear, at which three affidavits from the respondents and Edward W. Chatterton were put before the Court, but on which the affiants did not appear, and on which the petitioner was forced to stand haplessly by without any right of cross-examination or the usual safeguards of trial, as the judgment was ordered satisfied. It is respectfully submitted that it is markedly error to refer to this as perjured testimony resulting in the order which the petitioner seeks to vacate, declaring it "intrinsic" fraud, and depriving petitioner of the judgment without a proper hearing as required by Rule 60(b) of the Federal Rules. The opinion of the Circuit Court is in conflict in this regard with the standards of intrinsic and extrinsic fraud set forth in *Aetna Casualty and Surety Co.* v. *Abbott*, (4th Cir., 1942) 130 F.2d 40, 43, and *Chicago R.I. & P.R. Co.* v. *Callicote*, (8th Cir. 1920) 267 Fed. 799.

III

The Circuit Court's view that a suit for malicious prosecution may be filed before the action on which it is allegedly based has been finally terminated, stands in absolute conflict with the rule that there must be final termination

of an action before a claim of malicious prosecution based on it can be asserted. The Circuit Court's decision is in absolute conflict with decisions in other Federal Circuits. The petitioner cites two of them: In *Schwab* v. *Doelz*, (7th Cir., 1956), 229 F.2d 749, a dismissal of a complaint had been ordered but no formal order on the motion was entered. The defendant sought leave to file a counterclaim for malicious prosecution based on the dismissed action. It was held that because no order of dismissal had been entered the cause was not finally terminated, and "There must be a termination of the action before a claim of malicious prosecution based thereon can be asserted as a legal claim." *LaSalle National Bank* v. *222 East Chestnut Street Corporation*, (7th Cir., 1959), 267 F.2d 247, announces the same fundamental rule, and points out that where the action on which the malicious prosecution suit is based has not been finally terminated the malicious prosecution action cannot be maintained and its deficiency in this respect cannot be corrected by subsequent amendment.

CONCLUSION

For the reasons given above, and it being submitted that the questions presented are of general importance warranting this Court's review of them, the petitioner respectfully prays for the issuance of a writ of certiorari, directed to the United States Court of Appeals for the District of Columbia Circuit.

Dated: September 20, 1960.

Respectfully submitted,

JOSEPH O. JANOUSEK, *Pro Se*
American Security Building
Washington 5, D. C.

APPENDIX A

OPINION OF THE CIRCUIT COURT BELOW—
(Decided June 23, 1960)

Edgerton, *Circuit Judge*: No. 15470. In 1953 Janousek recovered a judgment against Effie D. Chatterton and others (Chatterton) for attorney's fees, requiring them to pay him a percentage of all sums afterwards received by them in payment of a previous judgment which he had obtained for Effie D. Chatterton in Texas. In 1957 Chatterton moved, with supporting affidavits, for an order of partial satisfaction of the plaintiff Janousek's judgment. In 1958, after an oral hearing at which Janousek offered no evidence, the District Court granted Chatterton's motion. The court said "nothing was presented showing support for the suspicion or hunch, asserted by plaintiff (Janousek) . . . that defendants (Chatterton) have received more funds than have been disclosed to him in settlement of the Texas judgment secured by plaintiff in behalf of the defendant Effie D. Chatterton . . . The plaintiff being unable to allege any facts in support of his contention that the judgment herein in his favor has not been fully satisfied as to the amount due under it to date . . . and the defendant having supported her application for extraordinary relief by uncontradicted proof of payment of the judgment in the total amount due plaintiff to date and defendant having shown the need for entry of partial satisfaction, the court feels constrained to deny plaintiff's motion to refer the case for hearing and trial of the issues and to grant the defendant's motion for order of partial satisfaction of judgment."

In *Janousek* v. *Chatterton*, No. 14448, 104 U.S. App. D.C. 300, 261 F.2d 766, we affirmed the order of partial satisfaction.

Janousek afterwards sued to vacate the order of partial satisfaction. In No. 15470, he now appeals from the Dis-

trict Court's order dismissing his second amended complaint. The complaint alleges, on information and belief, that the Chatterton affidavits were false and "part of a fraudulent scheme", but does not disclose the extent of the fraud, the source of the information, or the basis of the belief. It is questionable whether the complaint states "the circumstances constituting fraud . . . with particularity" as F.R.Civ.P. 9(b) requires. However, we need not consider that question. Since the alleged fraud consisted of perjured testimony resulting in the order which Janousek seeks to vacate, it was "intrinsic" and the District Court was right in dismissing his complaint. *Dowdey* v. *Hawfield*, 88 U.S. App. D.C. 241, 189 F.2d 637.

No. 15315. Effie D. and Elizabeth S. Chatterton, defendants and appellees in No. 15470, filed a counterclaim against Janousek for abuse of process. The District Court dismissed their counterclaim. In No. 15315 they appeal from this dismissal.

The counterclaim alleged Janousek knew he had no defense to the motion for an order of partial satisfaction; that he sought seven continuances of the hearing on that motion in the District Court, appealed from the order granting it and sought six continuances in the Court of Appeals; that he represented to a title company that he would ask the Court of Appeals for a rehearing and would petition the Supreme Court for certiorari, but did neither, "his sole purpose being to tie up defendant Effie Chatterton's funds with the title company"; that his suit to vacate the order of partial satisfaction was brought for this same purpose; and that after his complaint was dismissed he filed an amended complaint and also told the Chattertons that unless he is paid $1500 "he will keep this litigation going indefinitely, and thus prevent defendant Effie Chatterton from ever receiving her funds now held by the title company."

Appendix A

Prosecution of a civil suit with an improper motive and without probable cause is actionable as malicious prosecution, when it causes special injury such as seizure of property and ends unsuccessfully. *Melvin* v. *Pence*, 76 U.S. App. D.C. 154, 130 F.2d 423. *Cf.* Morfessis v. Baum, —— U.S. App. D.C. ——, —— F.2d —— (No. 15528, decided June 16, 1960). The counterclaim plainly alleges special injury and an improper motive. In substance, we think it alleges lack of probable cause. Though it was filed while Janousek's second amended complaint was pending, his original complaint had already been dismissed. Thus the counterclaim substantially meets the requirements of a suit for malicious prosecution.

It follows that we need not consider whether, as the caption of the counterclaim asserts, it alleges an abuse of "process". In an action for abuse of "process", it is unnecessary to allege that the suit in which the process was issued was brought without probable cause, or that the suit was unsuccessfully terminated. Restatement, Torts (1938) § 682; 1 Harper and James, Torts, p. 330; Hall v. Hollywood Credit Clothing Co., 147 A.2d 866 (Munic. Ct. App. D.C.). In this connection the term process has sometimes been given a broad interpretation. It has been said that suing for a debt which the plaintiff knows has been paid is an abuse of process. Lorusso v. Bloom, 321 Mass. 9, 71 N.E. 2d 218. No. 15470 affirmed. No. 15315 reversed.

• • • •

Appendix A

JUDGMENT OF THE CIRCUIT COURT—
(Entered June 23, 1960)

No. 15,315, Effie D. Chatterton, et al., Appellants, v. Joseph O. Janousek, Appellee. Civil 796-59.

No. 15,470, Joseph O. Janousek, Appellant, v. Effie D. Chatterton, et al., Appellees. Civil 796-59.

Appeals from the United States District Court for the District of Columbia. Before: Edgerton, Bazelon and Burger, Circuit Judges.

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia. No. 15,315 was argued by counsel for appellants and submitted on the brief for appellee, *pro se*. No. 15,470 was submitted on the briefs of the parties. ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court: (1) that in No. 15,470 the order of the District Court on appeal is affirmed; and (2) that in No. 15,315 the order of the District Court on appeal is reversed, and the case is remanded to the said District Court for further proceedings on the counterclaim not inconsistent with the opinion of this court. It is further ORDERED by the court that defendants Effie D. and Elizabeth S. Chatterton recover from plaintiff Joseph O. Janousek their taxable costs on these appeals and have execution therefor. Per Circuit Judge Edgerton. Dated June 23, 1960.

APPENDIX B

ORDER DISMISSING COUNTERCLAIM—(Filed June 30, 1959)

Upon consideration of the motion of plaintiff to dismiss the counterclaim and upon consideration of argument of counsel, and it appearing to the Court that the counterclaim fails to state a claim upon which relief can be granted, it is this 30 day of June, 1959, ORDERED that the counterclaim herein be and the same is hereby dismissed, and it is further ORDERED that counterclaimants' oral motion for leave to amend the counterclaim be denied, and It is expressly determined by the Court that there is no just reason for delaying the dismissal of such counterclaim and it is accordingly directed that judgment of such dismissal be entered. Alexander Holtzoff, Judge.

ORDER DISMISSING SECOND AMENDED COMPLAINT—(Filed August 25, 1959)

Upon consideration of the motion of defendants to dismiss the second amended complaint, and of the opposition to such motion, and upon oral argument in open court, it appearing to the court that the complaint as amended fails to state a claim upon which relief can be granted, it is this 25th day of August, 1959, ORDERED that the second amended complaint be and the same is hereby dismissed. Joseph C. McGarraghy, Judge.

APPENDIX C

EARLIER OPINION OF CIRCUIT COURT OF APPEALS IN NO. 14448, REFERRED TO IN PRESENT OPINION

Joseph O. Janousek, Appellant, v. Elizabeth S. Chatterton, Effie D. Chatterton and Eleanore C. Forsythe, Appellees. No. 14448. *Per Curiam.* A judgment creditor appeals from an order of partial satisfaction of a judgment entered on a motion filed by the judgment debtor pursuant to Rule 60(b)(5) F.R. Civ. P., 28 U.S.C.A. We find no error. Affirmed.

* * * *

APPENDIX D

EXCERPTS FROM THE RECORD IN NO. 14448 IN THE CIRCUIT COURT, REFERRED TO IN PRESENT OPINION OF THE SAID CIRCUIT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Joseph O. Janousek, Plaintiff, vs. Elizabeth S. Chatterton, Eleanor C. Forsythe, Effie D. Chatterton, Defendants. Complaint (Breach of Contract) (Filed December 11, 1951)

1. This Court has jurisdiction under Title 11, Chapter 3 of the District of Columbia Code, 1940.

2. The plaintiff is a citizen of the United States and at all times hereinafter mentioned was a member of the bar of the District of Columbia engaged in the practice of law in Washington, D. C.

3. The defendants are citizens of the United States, the defendants Elizabeth S. Chatterton and Eleanor C. Forsythe being daughters of the defendant Effie D. Chatterton.

4. On or about April 7, 1947, as a result of prior conferences and consultation of the defendants with the plaintiff, the said defendants, and each of them, in the District of Columbia, contracted with and engaged the professional services of the plaintiff for the prosecution of a claim of money due the defendant Effie D. Chatterton by her former husband, Edward W. Chatterton, the father of the defendants Elizabeth S. Chatterton and Eleanor C. Forsythe.

5. The said contract for professional services provided, *inter alia*, that the plaintiff was to institute and prose-

cute on behalf of the three defendants herein a suit in the name of Effie D. Chatterton against Edward W. Chatterton; that in consideration of services so rendered, the plaintiff herein was to receive as compensation a retainer of $300, and a further sum equal to 35% of all sums collected on any judgment obtained against Edward W. Chatterton. The defendants further agreed to provide and advance the costs of litigation.

6. Pursuant to the terms of the contract plaintiff undertook a detailed investigation, obtained necessary data and records, prepared the action for filing, arranged for the appearance of a member of the Texas bar as associate counsel, and, on or about May 22, 1947, filed suit in the interest of the three defendants herein, and under their direction, in the name of Effie D. Chatterton, Plaintiff, vs. Edward W. Chatterton, Defendant, Civil Action No. 916, in the United States District Court for the Eastern District of Texas.

7. Thereafter, until approximately May 7, 1950, the plaintiff herein rendered in behalf of the defendants herein extended professional services including opposition to and effecting dismissal of motions of Edward W. Chatterton, the taking of depositions in Texas and the District of Columbia, extensive conferences and correspondence in preparation for trial, directing and participating in the trial of the said cause in the United States District Court for the Eastern District of Texas, and preparing and filing legal memoranda and authorities in accordance with the Court's request at the conclusion of the said trial. As a result of the foregoing professional services rendered the defendants herein there was enterd in said Civil Action No. 916 in the United States District Court for the Eastern District of Texas a judgment for the plaintiff therein, Effie D. Chatterton, against the defendant, Ed-

Appendix D

ward W. Chatterton, in the sum of $18,846.06 with interest at 5 per cent per annum until paid.

8. Following entry of the said judgment the defendants herein declined the advice of the plaintiff herein relative to execution on the said judgment, and the said defendants commenced to communicate directly with the judgment debtor, Edward W. Chatterton.

9. On or about May 1, 1950, the defendants herein, and each of them, in wilful breach of their contract with the plaintiff herein, and in an attempt to avoid compensation of the plaintiff as provided by the contract, made an agreement directly with the judgment debtor, Edward W. Chatterton for the payment and satisfaction of the said judgment. The defendants herein, with the aid of the said judgment debtor, further attempting to avoid payment of plaintiff's compensation, caused to be filed in Civil Action No. 916 in the United States District Court for the Eastern District of Texas a document entitled "Compromise of Judgment" the recitals of which show payment and satisfaction of the said judgment under terms which are a subterfuge and which do not disclose the actual settlement of the defendants herein with the said Edward W. Chatterton.

10. No appeal was taken from the said judgment in Civil Action No. 916 in the United States District Court for the Eastern District of Texas, and on the date of the defendants' dismissal thereof in breach of their contract with the plaintiff, the said judgment was final, valid and subsisting.

11. As a result of the said breach of contract the defendants are indebted to the plaintiff in an amount equal to 35% of the judgment of $18,846.06, with interest at 5% thereon until paid.

Appendix D

WHEREFORE, plaintiff demands judgment in the sum of $6,696.12, with interest at 5% thereon until paid, besides costs. Joseph O. Janousek, Pro Se, 730 15th Street, N. W., Washington 5, D. C.

JUDGMENT—(Filed July 22, 1953)

This cause came on for hearing on the pleadings and the testimony and evidence of the parties in open court, and upon consideration thereof, after argument of counsel for the respective parties, it is by the Court this 22nd day of July, 1953,

ORDERED, ADJUDGED AND DECREED, that the motion of the defendants Elizabeth S. Chatterton and Eleanor C. Forsythe to dismiss the action as to them be and the same is hereby denied; and further

ORDERED, ADJUDGED AND DECREED, that the plaintiff shall recover of the defendants the sum of $730.00 and that the plaintiff have judgment and execution against the defendants therefor; and further

ORDERED, ADJUDGED AND DECREED, that the plaintiff shall have a judgment against the defendants in the amount of $17.50 each month on each monthly payment of $50.00 received by the defendants, or any of them, from Edward W. Chatterton under the compromise of the claims of Effie D. Chatterton against Edward W. Chatterton effected on May 1, 1950; and further

ORDERED, ADJUDGED AND DECREED, that the plaintiff shall have judgment against the defendants in an amount equal to 35% of any and all other sums received by the defendants, or any of them, in payment of the claims of Effie D. Chatterton against Edward W. Chatterton and the satisfaction and dismissal of the judgment in Civil Action No. 916 in the United States District Court for the Eastern District of Texas; and further

Appendix D

ORDERED, ADJUDGED AND DECREED, that the plaintiff shall recover of the defendants his costs in this action and that he have judgment therefor. Edward A. Tamm, United States District Judge.

ORDER—(Filed July 31, 1953)

Upon further consideration of the Findings of Fact, the Conclusions of Law and the Judgment entered herein, and counsel for the respective parties having agreed hereto, it is by the Court this 30th day of July, 1953.

ORDERED, that paragraph numbered 8 of the Findings of Fact be, and the same is hereby amended to read: "8. The Court finds that through June 30, 1953 the plaintiff should recover against the three defendants the amount of $665.00, representing 35% of the $1,900.00 actually paid to date, and that the plaintiff has a continuing right to recover 35% of future amounts collected by the defendants as a result of the settlement of the judgment."; and further ordered that the figure "$730.00," wherever it appears in the Findings of Fact, the Conclusions of Law and the Judgment entered herein be, and the same is hereby amended to read "$665.00." Edward A Tamm, United States District Judge.

MOTION FOR ORDER OF PARTIAL SATISFACTION OF JUDGMENT—(Filed October 3, 1957)

Comes now the defendant, Effie D. Chatterton, by and through her attorney and moves this Honorable Court for an order entering satisfaction of the judgment herein to the date of the hearing of this motion and for reasons therefor says as follows:

1. On July 22, 1953, a judgment was entered herein by this court in favor of plaintiff against defendants for the sum of $730 and "in the amount of $17.50 each month

on each monthly payment of $50 received by the defendants, or any of them, from Edward W. Chatterton under the compromise of the claims of Effie D. Chatterton against Edward W. Chatterton, effected on May 1, 1950."

And Plaintiff was further given judgment against defendants "in an amount equal to 35% of any and all other sums received by the defendants, or any of them, in payment of the claims of *Effie D. Chatterton* v. *Edward W. Chatterton* and the satisfaction and dismissal of the judgment in civil action 916 in the United States District Court for the Eastern District of Texas."

2. By further order of this Court entered July 30, 1953, the aforesaid judgment of July 22, 1953 was amended to substitute for the figure $730, the figure $665.

3. Defendant Effie D. Chatterton has since the rendition of the aforesaid judgment in this Court received the sum of $50 per month from Edward W. Chatterton and she has received no other payments in money or property on account of her settlement of the judgment in her favor against said Edward W. Chatterton with the exception of $100 received by her as recited in the findings of fact of this Court entered July 22, 1953.

4. Defendants have caused the aforesaid sum of $665.00 to be paid to plaintiff; costs amounting to $67.70, and defendants have further paid unto plaintiff the sum of $17.50 each month following the entry of said judgment on July 22, 1953, to the date of this motion, and that said judgment is paid to date. Despite the payment of such amounts to plaintiff, plaintiff has failed to file notice of such satisfaction of said judgment to date, though requested to do so by defendant, Effie D. Chatterton. There does appear on the record of this court a praecipe showing payment of $665.00 and costs as aforesaid plus $17.50 for the months of July and August, 1953. This defendant

avers that she is entitled to the entry of such partial satisfaction of judgment among the records of this Court and therefore respectfully moves this Court for an order showing that all monies due on account of said judgment have been fully paid to date. S. Churchill Elmore, Attorney for Defendant.

ANSWER IN OPPOSITION TO MOTION OF JUDGMENT DEBTOR—(Filed October 11, 1957).

The plaintiff opposes the motion of the judgment debtors which has been filed herein on the ground that since entry of the judgment in this action the judgment debtors have with the aid of Edward W. Chatterton, by non-disclosure and otherwise, continued to attempt to defeat and avoid payment for plaintiff's professional services rendered to the judgment debtors in *Effie D. Chatterton* vs. *Edward W. Chatterton*, Civil Action No. 916, in the United States District Court for the Eastern District of Texas, wherein a judgment of $18,846.06 was obtained for Effie D. Chatterton, one of the judgment debtors herein, against the said Edward W. Chatterton. The judgment in the Texas Court was subsequently dismissed by an arrangement between the judgment debtors herein and Edward W. Chatterton without the knowledge or consent of the plaintiff and judgment creditor herein who continues in substantial part unpaid for his professional services and for amounts due him under the judgment entered herein on July 22, 1953; and for other reasons and facts subsequently to be brought to the attention of the Court. Joseph O. Janousek, American Security Building, Washington 4, D. C.

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SUPPLEMENTAL OPPOSITION TO MOTION OF JUDGMENT DEBTORS—(Filed November 6, 1957)

The judgment in this case represents a fee for professional services on which the plaintiff, now judgment creditor, was compelled to sue Mrs. Effie D. Chatterton and her two daughters, Elizabeth Chatterton and Eleanor Forsythe, now the judgment debtors herein.

Although this Court has been asked for an order "entering satisfaction of the judgment" on a motion signed by S. Churchill Elmore, who appears as counsel of record for the defendants, preparation of the motion has in fact been directed by Clarence M. Dinkins who is, respectively, son-in-law and brother-in-law of the defendant judgment debtors.

The said defendant judgment debtors on or about May 1, 1950, arranged and effected a settlement of a judgment obtained in their behalf against Edward W. Chatterton in the United States District Court for the Eastern District of Texas in the amount of $18,846.06, without the knowledge of the attorney-plaintiff herein who had represented them. The judgment so settled and dismissed without this attorney's knowledge, and without provision for the payment of his professional fees and advancements, had been obtained for the parties after more than three years of intensive work in a vigorously contested action in the Texas District Court. The parties in so settling and dismissing the judgment removed from this attorney the fund out of which he was to receive 35% as compensation for his services. An additional period of about three years were necessary in litigation in the within proceeding to obtain the judgment which the judgment debtors now seek to show as satisfied in a continuing endeavor to avoid payment of professional compensation due this attorney.

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The deposition of Clarence M. Dinkins was taken on November 4, 1957, in aid of the judgment and execution under the provisions of Federal Rule 69. He admitted that the papers effecting the dismissal of the Texas judgment had been examined by him in 1950 and were in fact delivered to Effie D. Chatterton for signature by his wife, Margaret Louise Chatterton Dinkins. He admitted that when the within suit to recover professional compensation followed, he arranged for counsel to defend Mrs. Chatterton and her daughters, that he discussed the case, made suggestions to counsel and otherwise participated in the defense of the action, including attendance at most of the trial.

The testimony of this witness further shows that the filing of the motion seeking to show satisfaction of the judgment herein is the result of $4,200.00 presently being held by the Realty Title Company in the account of Effie D. Chatterton against the unsatisfied portion of the judgment herein; and that Clarence M. Dinkins and S. Churchill Elmore seek a release of the funds to enable them to collect one-third thereof as fees they claim of the said Effie D. Chatterton.

The witness Dinkins admits that he has from time to time been in touch with Edward W. Chatterton, who was the judgment debtor in the Texas suit, who is the former husband of Effie D. Chatterton, the father of Elizabeth Chatterton and Eleanor Forsythe, the judgment debtors herein, and the father-in-law of the said Clarence M. Dinkins through whose hands passed the papers surreptitiously dismissing the Texas judgment in 1950. The said Clarence M. Dinkins admits that he recently prepared the affidavit signed by Edward W. Chatterton on October 2, 1957, which accompanies the present motion, and which attempts to support the judgment debtors and

Messrs. Dinkins and Elmore in their endeavor to show payment of a judgment on which there are substantial amounts owing.

Despite the actual participation of Clarence M. Dinkins throughout this litigation, he has not at any time appeared as counsel of record. The judgment creditor herein has been unaware of the extent of his activities and his participation as off-the-record-counsel until the taking of his deposition on November 4, 1957.

In view of the foregoing circumstances, and the unabated efforts of the judgment debtors herein, with the aid and cooperation of Edward W. Chatterton and other family members, to conceal the actual terms by which the Texas judgment was paid, satisfied and dismissed surreptitiously to avoid and defeat payment of attorney fees, and the continuing non-disclosure and concealment by the parties of funds which obviously have been and are passing between them in an endeavor to avoid payment of the judgment herein, the affidavits of these parties filed with their motion do not satisfy the plaintiff and judgment creditor.

There is no dispute about the judgment debtors having paid $665.00 on the judgment shortly following its entry in 1953, or the sum of $17.50 from that date to October 1957; which is, however, but a fractional part of 35% of $18,836.06 which amounts to approximately $6,595.00.

The fifth paragraph of the judgment herein recites: that the plaintiff "shall have judgment against the defendants in an amount equal to 35% of any and all other sums received by the defendants, or any of them, in payment of the claims of Effie D. Chatterton against Edward W. Chatterton and the satisfaction and dismissal of the judgment in Civil Action No. 916 in the United States District Court for the Eastern District of Texas."

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The judgment debtors have obviously received funds beyond the amounts they say they have received, on which this judgment creditor is entitled to 35%.

There has been no payment and satisfaction to date under the fifth paragraph of the judgment herein, and it is respectfully requested that the pending motion be denied. Joseph O. Janousek, American Security Building, Washington, D. C.

MOTION TO REFER CASE FOR HEARING AND TRIAL OF ISSUES—(Filed February 12, 1958)

The plaintiff and judgment creditor herein, moves the Court to refer this case to the Assignment Commissioner to be assigned for hearing, trial and determination of the issues existing under the motion of the judgment debtors, filed under Rule 60(b)(5) of the Federal Rules of Civil Procedure, attempting to show satisfaction of the judgment herein, and the opposition of the plaintiff and judgment creditor thereto. Joseph O. Janousek, Plaintiff, American Security Buliding, Washington 5, D. C.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION—(Filed Feb. 12, 1958)

The defendants and judgment debtors have filed a motion under Rule 60(b)(5) of the Federal Rules seeking an order declaring payment and satisfaction of the judgment of record in this action, which continues in major part unpaid and unsatisfied.

Other than the payment of $665.00, shortly following entry of the judgment in 1953, and $17.50 a month from that time to and including February 1958, the judgment continues unsatisfied with respect to paragraph 5 of the judgment which provides:

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ORDERED, ADJUDGED AND DECREED, that the plaintiff shall have judgment against the defendants in an amount equal to 35% of any and all other sums received by the defendants, or any of them, in payment of the claims of Effie D. Chatterton against Edward W. Chatterton and the satisfaction and dismissal of the judgment in Civil Action No. 916 in the United States District Court for the Eastern District of Texas;

To avoid unnecessary repetition, the Court is respectfully referred to the two memorandums filed in this case by the plaintiff in opposition to the judgment debtors' motion respectively entitled "Answer in opposition to motion of judgment debtor" and "Supplemental opposition to motion of judgment debtors". The Court is also referred to the stenographic transcript of the proceedings in this matter before Judge Sirica on November 7, 1957. This material, already of record in this action, sets forth fully the existing issues and the reasons upon which the plaintiff and judgment creditor opposes any showing of payment or satisfaction of the judgment under paragraph 5.

Since argument of the matter before Judge Sirica, the plaintiff has made further investigation and has attempted to get to the bottom of the irregularity in this matter —an irregularity which the Court sensed (pages 21 and 22, Transcript of hearing before Judge Sirica, November 7, 1957) and which continues to exist. Among other efforts, the Plaintiff has attempted to ascertain facts and elicit information on the basis and method of the dismissal of the Texas judgment by taking the deposition of Edward W. Chatterton, former husband and father, respectively, of the several judgment debtors herein, who contrived with them to effect the dismissal of the Texas judgment without payment for professional services due the plaintiff, Joseph O. Janousek, herein. By deposition

the plaintiff herein has also attempted to obtain information from Effie D. Chatterton, who signed and had transmitted (in some manner which is yet undisclosed) to Edward W. Chatterton the documents effecting dismissal of the Texas judgment. These and other depositions were adjourned on January 28, 1958, as a wholly ineffective and fruitless endeavor in this instance because of the evasiveness, equivocation and circumlocution of the witnesses who continue to avoid making any disclosure of facts relating to the dismissal of the Texas judgment, and other facts bearing upon amounts due the plaintiff under paragraph 5 of this judgment.

The matter can be resolved only by a hearing and trial of the issues before and under control of the Court, where the witnesses can be examined and required to give direct and responsive answers under the supervision of the Court, and where the Court in passing upon the issues will have an opportunity to measure the credibility of the witnesses and the testimony given, all very important factors under the circumstances existing in this case.

Proceedings of this kind, under Federal Rule 69(b), are the modern counterpart of the former independently brought action, sometimes referred to as *audita querela* and it is said that the practice of holding hearings on the issues is desirable. In some instances jury trials have been allowed. 7 Moore's Federal Practice, pages 329, 330.

It is, therefore, requested that this proceeding be referred to the Assignment Commissioner for assignment for hearing by a Judge of this Court, for trial and determination of the issues existing. Joseph O. Janousek, American Security Building, Washington 5, D. C.

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From argument on motions before Judge Richmond B. Keech, Motions Division, United States District Court for the District of Columbia, February 14, 1958:

Mr. Janousek: * * * I am before the Court this morning on the motion to refer this case for hearing before the Court for two reasons.

The Court: Refer it to whom?

Mr. Janousek: Refer the case to a Judge for determination, which I am going to point out is a customary procedure under the rules and under a case which I have and wish to cite. Before doing that, I would like to give the Court my reasons why. I have sought to again take the deposition of Mrs. Effie D. Chatterton also for the first time to take the deposition of Edward W. Chatterton, who was the defendant in the Texas proceeding, who, with Mrs. Effie D. Chatterton and her daughters, dismissed the case. I have not before had the opportunity to take Mr. Chatterton's deposition.

The Court: Why?

Mr. Janousek: Because he has been in Texas until this matter came up. I think he has been here since '54, but I wasn't aware of it until this came up. He was a resident of Texas and I didn't go to the expense of going down to take it.

In taking Mr. Chatterton's deposition on January 28, I adjourned it to a later date because of the fact that, simply, sometimes depositions cannot be properly controlled without the testimony being taken before the Court. Mr. Chatterton, I regret to say, is evasive. He clearly remembers only certain sums of money passed between him and the plaintiff in the Texas suit. He can't remember certain fundamental details that accompanied that. He couldn't remember back until October of last

year when he signed an affidavit helping these parties show satisfaction. He couldn't remember where that affidavit was signed until I asked him where the Notary Public was. He can't give any of the details. His memory is very poor. It is very fine on whatever helps these parties.

I merely bring that out. I feel if it is brought on before the Court, the taking of the testimony of these parties and other witnesses, the Court will have control of the situation, will make findings of fact and conclusions of law and the matter will be properly disposed of in that form.

I feel that the circumstances in this case, being as they are, with the long history in this case of rather indirect dealing that has occurred, with my inability at the present time to obtain by deposition reasonable answers to questions reasonably framed.

THE COURT: You are pitching that on the fact of the evasiveness of the witnesses you have called?

MR. JANOUSEK: Yes, sir. And the fact that I should not at this time be expected to forego my right to recover 35 percent of any and all other amounts collected by these plaintiffs upon the perfunctory showing they have made by affidavits before the Court.

In that connection, I want to say that the affidavits put before the Court declaring those are the only sums are the very affidavits of the people who effected the dismissal of the Texas judgment at that time and who have every interest in that respect in the case.

I would like similarly to say this to Your Honor, that the showing of a full satisfaction of the judgment at this time would deprive me without full hearing of the right

to execute and collect the money that is due me, has been due me for a long period of time. I simply request the Court to set it down before a Judge of this Court so that testimony can be taken and we could get to the bottom of some of the things that exist in this matter.

I think Your Honor should know that 35 percent of the $18,000 comes to something over $6,000, and at the present time I have received about $1,500 on that amount and nothing more.

To show satisfaction of all presently existing payments at this time would deprive me of my right to come into something that is properly mine and I therefore ask the Court to refer the matter for hearing. * * *

THE COURT: How long do you anticipate that hearing will take?

MR. JANOUSEK: It would take the better part of the day. I wish to call some witnesses from department stores and other places in Washington to show substantial expenditure of funds by these people. I don't believe Mr. Elmore has Edward W. Chatterton, who would be a very important witness. He is the witness I referred to whose deposition was fruitless.

THE COURT: Would you anticipate having him here?

MR. JANOUSEK: Yes, sir.

THE COURT: How would you get him here?

MR. JANOUSEK: He is in Virginia.

THE COURT: He is within service?

MR. JANOUSEK: He is within 100 miles. He is in Arlington. I also have a number of other witnesses I would wish to call and put evidence before the Court.

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ORDER—(Filed February 17, 1958)

This case came on for hearing before the court on February 14, 1958, on the motion of the defendant Effie D. Chatterton filed October 3, 1957, for order of partial satisfaction of the judgment herein, and on plaintiff's motion to refer the case for hearing and trial of the issues, filed February 12, 1958. The motion for partial satisfaction was originally heard by Judge Sirica on November 7, 1957, and was continued for ninety days to permit the plaintiff to go to Texas and pursue whatever leads he might have there. Judge Sirica specified that the matter was to be finished and completed within ninety days from November 7, 1957 (Transcript November 7, 1957, p. 22). At the hearing before this court, nothing was presented showing support for the suspicion or hunch asserted by the plaintiff before Judge Sirica, that defendants have received more funds than have been disclosed to him in settlement of the Texas judgment secured by the plaintiff in behalf of the defendant Effie D. Chatterton. Plaintiff indicated to this court that he had taken certain depositions in the interval, without result, and for that reason had not caused them to be transcribed. The plaintiff being unable to allege any facts in support of his contention that the judgment herein in his favor has not been fully satisfied as to the amount due under it to date, the time allotted by Judge Sirica having elapsed, and the defendant having supported her application for extraordinary relief by uncontradicted proof of payment of the judgment in the total amount due plaintiff to date and defendant having shown the need for entry of partial satisfaction, the court feels constrained to deny plaintiff's motion to refer the case for hearing and trial of the issues and to grant the defendant's motion for order of partial satisfaction of judgment. It is, therefore, this 15th day of February, 1958,

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ORDERED That the plaintiff's motion to refer the case for hearing and trial of issues be and the same is hereby denied; and it is further

ORDERED That defendant's motion for order of partial satisfaction of judgment be and the same is hereby granted. /s/ R. B. Keech, Judge.